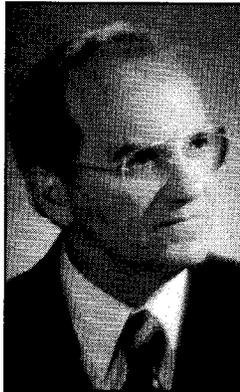


Depositions v. Trials: Of Tire Tools & Potato Peelers

By Judge Jerry Buchmeyer



Which is worse? The dangers of depositions or the tribulations of trials? The saga continues... with contributions from California, Colorado, and Florida.

Would You State Your Name For the Record, Please?

Trial lawyers know that witnesses have names only for one reason: so they will have a simple, fail-safe question to begin the deposition or trial testimony. But even here, strange things may happen.

From **William G. Reid** of Austin (assistant district attorney), this "name discovery" in a reported murder trial,¹ where the witness — who "testified that he had seen the murder victim and the defendant in a car on the morning of the murder" — began his testimony with:

Q. State your name, please.

A. Earnest *Baloney*.²

From **Mark S. Stewart** of Fort Worth (Mark S. Stewart & Associates), this "name problem" from a deposition in a workers' compensation case:

Q. Were you divorced in Tarrant County?

A. Yes, sir.

Q. Your ex-husband's name is what?

A. Augustine Ruez.

Q. Augustine *Ruez* ?

A. Uh-huh, (spelling) *R-U-E-Z*.

Q. *Are you easy?*

A. *That's right.* You got it right.

Mark "confesses" that, when his client reviewed the deposition and "asked what this meant," he "was at a total loss as to what to tell her."

I'm Glad We Cleared That Up

From Mark Sklan of Irvine, CA (Smith, Smith & Kring), this deposition excerpt which demonstrates that "here, in enlightened California, as late as June 7, 1989, attorneys can still be surprised."

Q. And what is Dr. Van's first name?

A. I don't know.

Q. Is Dr. Van still practicing in Garden Grove, to your knowledge?

A. I don't know. Probably.

Q. When you joined Dr. Van in Garden Grove, can you tell me your responsibilities and duties?

A. I was an employee working — *She* was paying me per hourly. *She* does all the diagnosis, and I just do the work.

Q. *Dr. Van was a woman?*

A. *Right.*

Q. *Was she also a dentist?*

A. Yes.

From **John C. Brant** of West Ridge, CO, this excerpt from the deposition he took of "Aron B. Katz, a Yale Law School Graduate and a defendant" in a case pending in Boulder County District Court:

Q. Are you familiar with the concept of fiduciary duty?

A. In a general sense.

Q. Did you take a course in trusts and estates, for example, at Yale Law School?

A. It was 30 years ago and *Yale Law School has always been known for dealing with higher and more esoteric issues than fiduciary obligations.*

Was It Good For You?

From **Cactus Jack Cagle** of Houston (Norvelli, Harvie and Cagle), this excerpt from a deposition he took in a divorce case, with the explanation that "the witness was the husband accused of adultery in the marital relationship. In previously answered interrogatories, he had admitted sexual relationships outside of the marriage. The parties had taken the deposition of at least one of several women purported to have enjoyed the full benefit of his solace, comfort, and prowess."

Q. So if anyone said that they had had sexual relationships with you, then they would be lying, correct?

Husband's attorney: I object. *That would be asking my client to speculate as to something he has no knowledge of.* He has stated what he knows.

Q. Are you going to answer the question? Husband's Attorney: On the basis of my objection, no.

Mr. Cagle (wisely): Certify it, please.

And Further Deponent Sayeth Not

From **Judge R. Wallace Peck** of Fort Myers, FL (Circuit Judge, Twentieth Judicial Circuit of Florida), these excerpts from the videotaped deposition of the defendant's expert in a medical malpractice case:

Q. (by plaintiff's attorney): And what would that have told you if there was fluctuance beginning or present?

A. I've already answered that the presence of fluctuance indicates an abscess. *Look, how much more do we have to do here? Frankly I've got — it's now almost 7:30. I'm really running out of patience here. And in fact I'm about ready to walk out of this.* If this has to continue, then I've about had it. *This guy is driving me up a wall.* Now we've gone through these things 20 different times—

DEF. ATTNY (helpfully): Doctor, I apologize. But I would submit perhaps he's doing it intentionally just for this purpose.

A. I'm absolutely convinced that he is. Now, fellow, I'm telling you. I'm getting tired of this. I need to go. We've been here two and a half hours. This frankly is bull. And you're a slimy son of a bitch, I think.

PL'S. ATTNY (diplomatically): Then why don't you walk out? Go ahead. Don't threaten me. Get up off your ass and walk out.

A. Turn that thing off a minute.

PL'S. ATTNY: I'm going to move to strike the witness because I can't complete my cross examination.

DEF. ATTNY: You can move whatever you want, counselor.

PL'S. ATTNY: Is this deposition concluded?

DEF. ATTNY: It would appear so, thanks to your stupidity and obstinance. (And further deponent sayeth not).

Judge Pack adds: "As you might well imagine, the jury did not get the benefit of the concluding remarks."

"Is It Too Late to Get Out on Bail?"

From sentencing in a murder case:

THE COURT: The defendant saying nothing in legal bar, it is the order of the Court that the Sheriff of Cameron County, Texas, deliver the defendant to the Director of Corrections of the Texas Department of Corrections, *and there he be confined for life.*

THE DEFENDANT: Damn.³

The Warner Trilogy

From Larry Warner of Harlingen, three trial contributions, complete with Larry's own subtitles:

"There's a Subtle Difference"

Q. Officer, did you advise the defendant that he had the right to remain silent and not make any statements at all?

DEF. ATTNY: Objection. Counsel is leading the witness.

PROSECUTOR: Your Honor, It's a yes-or-no question.

THE COURT: He may answer the question. This is for purposes of hearing on your motion?

PROSECUTOR: *I'm not asking if it's true that he did this; I'm just asking if he did this.*

If the Witness Had Been a Man, He Would Have Had a Vasectomy

From the prosecutor's opening statement: "I do just want to briefly tell you that I anticipate it to be a very short trial. I was going to have seven witnesses for you. Since that time, one of my witnesses, *a lady*, had to have a cesarean section a couple of days ago and because of doctor's orders she will not be able to attend. So I'm down to six witnesses."

Of Tire Tools and Potato Peelers

From H.F. Rick Hagen of Lockhart (assistant criminal district attorney, Caldwell County), this excerpt from a misdemeanor case he tried before Judge Edward L. Jarrett. The defendant was charged with "harassment resulting from an obscene phone call," and defense attorney Douglas Behrendt of San Marcos is cross-examining the supposed "victim."

Q. Now, Ms. Victim, you indicated in your criminal history that you had an assault conviction. Did that involve a fight with your husband?

A. Yes, sir.

Q. When was that?

A. July the 11th of last year.

Q. Did it get pretty nasty, the fight, physically?

A. No, no fight to it. *I just waited for him in a bush with a tire tool.* When he came by, I jumped out and clobbered him with it. My husband didn't hit me. I hit my husband.

Q. Well let me ask you this: Has he ever hit you?

A. Yes, one time back in 1972, he slapped

me. *I stabbed him 41 times with a potato peeler.*

Q. 41, 41 times with a potato peeler?

A. He's never hit me since then.

Judge Jarrett (trying to control the laughter): Excuse me, Ms. Victim, (laughing by Judge Jarrett).

Mr. Hagan (more laughter):

Q. Ms. Victim, let me ask you this: Is there any way that this fight with your husband — I mean, this altercation with your husband and my client, was there any indication that they would get physical with each other?

A. Oh, yes.

Q. All right. Is there any way that your husband suggested that you file charges against the defendant?

A. No. My husband never suggests anything to me. I do exactly on my own and my husband does exactly what I tell him to or I throw him out on the street with no place to live. That's where he's at right now.

Q. Out on the street?

A. Yes.

Q. So, are you telling the court then, that you don't have any fear of your husband if you don't pursue this particular case?

A. I have no fear of my husband on anything.

Rick Hagan adds: "The verdict was not guilty."

1. *Nathan V. State*, 611 S. W. 2d 69 72 (Tex. Cr. App. 1981).
2. This answer reminded me of a deposition which I took years ago in my former life as an attorney. When I clearly began the deposition with "*What's your full name, please?*" the witness responded *Napoleon Bonaparte Wilson*. Ever since then, I have regretted — this was obviously a once-in-a-lifetime opportunity — not saying immediately, and with just the right flourish, no further questions.
3. Larry Warner's other suggested titles for the murder case/sentencing response: "*I was hoping for probation,*" and "*What about deferred adjudication?*"

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